Supreme Court, U.S.
FILED
001115 JAN 10 2001
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LITTLE SIX, INC. AND
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA)
COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), exempts Native American Tribes from the wagering excise and occupational taxes imposed by Sections 4401 and 4411 of the Internal Revenue Code.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 210 F.3d 1361. The order of the United States Court of Federal Claims (App., *infra*, 12a-19a) is reported at 43 Fed. Cl. 80.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2000. A petition for rehearing was denied on

October 12, 2000 (App., *infra*, 20a-28a) and is reported at 229 F.3d 1383. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The relevant portions of the Internal Revenue Code, 26 U.S.C. 4401-4402 and 7871, and the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), are set out in App., *infra*, 29a-34a.

STATEMENT

1. Respondents are a Native American tribe in Minnesota and a corporation wholly owned by the Tribe (Little Six, Inc.).[1] Either the Tribe or Little Six operated gaming activities during 1986-1992, which included the sale of pull-tab cards. Pull-tab cards are manufactured in sets of 1,500 or more, and each set has a predetermined number of cash prize winners. A player peels back the tabs on a pull-tab card to see whether he has won a prize. App., *infra*, 2a.

Section 4401(a) of the Internal Revenue Code (the Code) imposes an excise tax on wagers, and Section 4411 imposes an occupational tax on each person liable for the wagering excise tax (hereinafter referred to jointly as "wagering taxes"). 26 U.S.C. 4401(a), 4411. The term "wager" includes any lottery, which, in turn, includes pull-tabs. 26 U.S.C. 4421; Rev. Rul. 57-258, 1957-1 C.B. 418. Section 4402(3) of the Code grants a wagering excise tax exemption for state-conducted lotteries, but there is no such exemption for tribe-con-

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[1] Little Six, Inc., as a wholly owned corporation of the Tribe created pursuant to 25 U.S.C. 477, has the same federal tax status as the Tribe. See *Maryland Cas. Co.* v. *Citizens Nat'l Bank*, 361 F.2d 517, 521-522 (5th Cir.), cert. denied, 385 U.S. 918 (1966); Rev. Rul. 81-295, 1981-2 C.B. 15.

ducted lotteries. There is also no exemption for tribe-conducted lotteries in Section 7871(a), 26 U.S.C. 7871(a), a provision that treats Tribes as States for purposes of certain excise tax exemptions, but does not include an exemption for wagering excise taxes.

Respondents did not file wagering excise tax returns for any of the periods in issue (January 1, 1986 through June 30, 1992). The Internal Revenue Service determined that respondents were liable for the wagering taxes (respondent Shakopee Mdewakanton Sioux (Dakota) Community for the periods from January 1, 1986 through March 31, 1991, and respondent Little Six, Inc. for the periods April 1, 1991 through June 30, 1992). App., *infra*, 13a.

Respondents paid the taxes claimed by the Internal Revenue Service and filed administrative claims for refund challenging their liability for the wagering taxes. After the Internal Revenue Service disallowed their claims, respondents filed a refund suit in the Court of Federal Claims to recover wagering taxes paid for tax periods from January 1, 1986 through June 30, 1992. App., *infra*, 13a. Respondents claimed, among other things, that they were exempt from the wagering taxes under Section 20(d) of the Indian Gaming Regulatory Act (IGRA), Pub. L. 100-497, 102 Stat. 2467 (25 U.S.C. 2719(d)) (hereinafter IGRA § 2719(d)), which provides in pertinent part:

> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State com-

> pact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

Although IGRA § 2719(d) concerns only the reporting and withholding on winnings from wagering or gaming operations, respondents claimed that the parenthetical reference to Chapter 35, which in I.R.C. Section 4402(3) exempts States from the wagering excise tax, provides Tribes with the same exemption. Respondents argued that because Chapter 35 does not specifically address the reporting and withholding of taxes from "winnings" contemplated in the body of IGRA § 2719(d), the Chapter 35 reference rendered IGRA § 2719(d) ambiguous. Relying upon the canon of statutory construction that ambiguities be resolved in favor of Indians, respondents maintained that the Chapter 35 reference must be interpreted to grant Tribes the wagering tax exemption that States enjoy under I.R.C. Section 4402(3). App., *infra*, 16a.

2. The Court of Federal Claims rejected respondents' argument. That court held that IGRA § 2719(d) applies federal withholding and reporting requirements to Tribes in the same manner as States, and that Chapter 35 deals with the "entirely different issue" of the excise tax on wagering. App., *infra*, 16a. The court declined to apply the canon of construction that ambiguities be resolved in favor of Indians, explaining that although Chapter 35 does not directly relate to reporting and withholding, "this possible oversight on the part of IGRA's drafters does not present tribes with a 'blank check' to assume the mantle of states in all cases." App., *infra*, 16a-17a.

3. The court of appeals reversed, holding that the parenthetical reference to Chapter 35 in IGRA

§ 2719(d) exempts tribes from wagering taxes. App., *infra*, 1a-11a. The court ruled that IGRA § 2719(d) is ambiguous because its references to Chapter 35 and to I.R.C. Section 6050I (imposing reporting requirements on receipts of gaming operators) are inconsistent with its reference to the reporting and withholding of taxes on winnings. *Id.* at 8a. Applying the canon of construction that ambiguities should be resolved in favor of Indians, the court of appeals reasoned that the reference to Chapter 35 should be interpreted as a tax exemption for Tribes. *Id.* at 8a-9a.

The Federal Circuit denied the United States' petition for rehearing *en banc*, with three judges dissenting. App., *infra*, 20a. Judge Dyk, in a dissenting opinion joined by Judges Newman and Plager, stated that the court of appeals should have examined "the statute's structure, purpose, and history, in order to produce an interpretation that makes the statute coherent" before resorting to the Indian canon of construction. *Id.* at 23a. Believing it unlikely that Congress would create a significant tax exemption through a parenthetical reference, Judge Dyk reasoned that it was "far easier" to make sense of IGRA § 2719(d) by reading the reference to Chapter 35 as a superfluous parenthetical example rather than as a provision contradicting the statute's specific limitation to Internal Revenue Code provisions "concerning the reporting and withholding of taxes." *Ibid.* Judge Dyk also noted that the legislative history revealed that a prior version of IGRA § 2719(d) contained a specific reference to the "taxation and reporting and withholding of taxes," but that the "taxation" reference was dropped from the final version. *Id.* at 25a-26a (emphasis omitted). Finally, Judge Dyk viewed IGRA's stated purpose of promoting tribal economic

development as "too open-ended" to support a tax exemption. *Id.* at 26a. Having determined that the structure, purpose, and history of IGRA § 2719(d) "all support the conclusion that the statute's reference to chapter 35 is superfluous," Judge Dyk concluded that the panel "place[d] more weight on the canon of construction regarding resolving ambiguities in favor of the Native Americans than that canon can bear." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the same question that is presented in the petition for a writ of certiorari filed in *The Chickasaw Nation and The Choctaw Nation* v. *United States*, No. 00-507. In that case, the Tenth Circuit directly addressed and rejected the Tribes' contention that IGRA § 2719(d) grants Tribes the same exemption from the wagering taxes afforded States under I.R.C. Section 4402(3). *Chickasaw Nation* v. *United States*, 208 F.3d 871 (2000). The decision below directly conflicts with the Tenth Circuit's decision in *Chickasaw Nation.*

The taxation of tribal gaming operations is an important federal issue that is likely to recur as the Indian gaming industry continues to expand. Resolution by this Court of the conflict in the circuits on the taxation of tribe-operated lotteries is appropriate to enable the United States to administer the tax laws consistently to all Indian gaming operators. Accordingly, for the reasons set forth in the government's brief acquiescing in the petition filed in the *Chickasaw Nation* case,[2] the petition in this case should be held for resolution of the petition in *Chickasaw Nation* and disposed of as

[2] We have provided respondents with a copy of the brief filed on behalf of the United States in response to the petition for a writ of certiorari in the *Chickasaw* case.

appropriate in light of the Court's disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *The Chickasaw Nation and The Choctaw Nation* v. *United States*, No. 00-507, and disposed of as appropriate in light of the resolution of that case. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5083

LITTLE SIX, INC. AND SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

April 24, 2000

Before: MAYER, Chief Judge, LOURIE and SCHALL, Circuit Judges.

LOURIE, Circuit Judge.

The Shakopee Mdewakanton Sioux (Dakota) Community and its wholly-owned corporation, Little Six, Inc., (collectively "Little Six") appeal from the decision of the United States Court of Federal Claims denying their claim for a refund of federal excise taxes and related occupational taxes paid on gaming operations conducted on their reservation between 1986 and 1992. *See Little Six, Inc. v. United States*, 43 Fed. Cl. 80 (Fed. Cl. 1999). Because we conclude that Indian pull-tab games are exempt from federal wagering taxes under Chapter 35 of the Internal Revenue Code, we reverse.

BACKGROUND

Little Six filed suit for a refund of federal excise taxes paid on wagers placed on "pull-tab" games operated on its reservation in Minnesota.[3] *See Little Six*, 43 Fed. Cl. 1 at 81. After conducting an audit, the Internal Revenue Service (IRS) assessed taxes against Little Six according to I.R.C. §§ 4401 and 4411. *See id.* Under section 4401(a)(1), a federal excise tax is imposed on "state authorized" wagers. Any person who is liable for the tax imposed by section 4401 must also pay a related occupational tax under section 4411. The taxes assessed for the period in question totaled $174,289, which Little Six paid under protest. *See id.* After the IRS denied its administrative claim, Little Six filed this suit in the Court of Federal Claims. *See id.*

The Court of Federal Claims granted the government's motion for summary of judgment, and denied Little Six's cross-motion. *See id.* at 84. The court held that Indian gaming was subject to taxation under sections 4401 and 4411, rejecting Little Six's argument that those taxes did not apply to wagers on pull-tab games because they were not "state authorized". *See id.* at 82, 84. The court further held that Little Six had not demonstrated any valid exemption to such taxes, rejecting Little Six's alternative argument that 25 U.S.C. 2719(d)(1) exempts Indian tribes from taxes at issue. *See id.* at 82-84. Little Six now appeals to this court. We have jurisdiction pursuant to 28 U.S.C. 1295(a)(3) (1994).

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[3] Pull-tab games are similar to state-conducted lotteries. Each pull-tab card has four or five tabs that can be peeled back to reveal whether the purchaser is entitled to a cash prize.

DISUCSSION

We review the Court of Federal Claims' grant of a motion for summary judgment "completely and independently, construing the facts in the light most favorable to the non-moving party." *See American Airlines, Inc. v. United States*, 204 F.3d 1103, 1108 (Fed. Cir. 2000) (quoting *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999)). In reviewing a denial motion for summary judgment, we give considerable deference to the trial court, and "will not disturb the trial court's denial of summary judgment unless we find that the court has indeed abused its dsicretion." *Suntiger, Inc. v. Blublocker Corp.*, 189 F.3d 1327, 1333 (Fed. Cir. 1999). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See id.* When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. *See McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999). If there are no material facts in dispute precluding summary judgment, "our task is to determine whether the judgment granted is correct as a matter of law." *Marathon Oil Co. v. United States*, 177 F.3d 1331, 1337 (Fed. Cir. 1999).

A. *State Authorized Wagers*

We first address the parties' arguments concerning whether wagers placed on Indian pull-tab games are subject to taxation under I.R.C. §§ 4401 and 4411. Little Six argues that these tax provisions only apply to wagers authorized under state law and therefore do not apply to pull-tab games, which are authorized under

federal law. The government responds that these tax provisions do apply to wagers on pull-tab games because all legal wagers, including those authorized under federal law, are "state authorized."

We agree with the government that wagers placed on Indian pull-tab games are subject to taxation under sections 4401 and 4411, because they are "state authorized." We reach this conclusion based upon the plain language of the relevant statutes. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). Section 4401(a) provided as follows:

> **(1) State authorized wagers.**—There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.
>
> **(2) Unauthorized wagers.**—There shall be imposed *on any wager not described in paragraph (1)* an excise tax equal to 2 percent of the amount of such wager.

I.R.C. § 4401(a) (emphasis added). Section 4411 imposes a related occupational tax and provides in relevant part that:

> **(a) In general.**—There shall be imposed a special tax of $500 per year to be paid by each person who is liable for the tax imposed under section 4401 . . .

> **(b) Authorized persons.**—Subsection (a) shall be applied by substituting "$50" for "$500" in the case of—
>
> > **(1)** any person whose liability for tax under section 4401 is determined only under paragraph (1) of section 4401(a), and
> >
> > **(2)** any person who is engaged in receiving wagers only for or on behalf of persons described in paragraph (1).

I.R.C. § 4411. Thus, according to the clear language of these two statutes, all wagers are either "state authorized" or "unauthorized," and any person who is liable for the excise tax under section 4401 must also pay the related occupational tax under section 4411.

The statutory basis for the regulation of Indian gaming is set forth in the Indian Gaming Regulation Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (1994 & Supp. 1997)). Under the IGRA, tribes may operate "class II gaming" activities, which includes pull-tabs, provided that "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2701(b)(1)(A); *see also* 25 U.S.C. § 2703(7)(A)(i) (defining "class II gaming" to include pull-tabs). Thus, in order for pull-tab games to be authorized under federal law, class II gaming must be permitted by the state in which such gaming is located.

In the present case, the parties do not dispute the fact that Minnesota permits non-profit organizations to conduct pull-tab games. Thus, "such Indian gaming is

located within a state that permits such gaming" by an organization. 25 U.S.C. § 2701(b)(1)(A). Accordingly, any wagers placed on Indian pull-tab games cannot be "unauthorized," because they are authorized under the IGRA. *See id.*; 25 U.S.C. § 2703(7)(A)(i). We therefore conclude that pull-tab games are authorized under both federal law and the law of the state in which they are conducted, and that wagers placed on those games are "state authorized" for the purpose of assessing taxes under sections 4401 and 4411 of the Internal Revenue Code.

B. *Wagers Tax Exemptions*

Having determined that wagers placed on Indian pull-tab games are subject to taxation under sections 4401 and 4411, we next turn to the parties' arguments concerning whether Little Six is nevertheless exempt from excise and occupational taxes. Little Six argues that, under 25 U.S.C. § 2719(d)(1), Indian gaming is exempt from wagering taxes in the same manner as state gaming. Little Six contends that Indian pull-tab games should be exempt from the taxes imposed by sections 4401 and 4411, because state-conducted lotteries are exempt from them under I.R.C. § 4402(3) (exempting state-conducted lotteries from wagering taxes). Little Six further contends that, to the extent that section 2719(d)(1) may be unclear, the Indian canon of construction requires any ambiguity in the statute to be resolved in favor of the Indians.

The government responds that there is no provision in the IGRA that expressly exempts Indian pull-tab games from the taxes at issue. The government argues that section 2719(d)(1) only applies to the reportikng and withholding of taxes from the winnings of players,

and does not affect the tax liability of the entities that operate these games. The government finally argues that the Indian canon of construction does not apply in this case because: (1) Congress did not intend to create an excise tax exemption; (2) the statute cannot be reasonably construed to confer a tax exemption; and (3) tax exemptions must be clearly expressed, not implied.

We agree with Little Six that, although wagers placed on Indian pull-tab games are subject to taxation under I.R.C. §§ 4401 and 4411, Indian tribes are nevertheless exempt from such taxes under 25 U.S.C. § 2719(d)(1). Again, we begin with the language of the relevant statutes. Section 2719(d)(1) provides in relevant part that:

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, *and chapter 35 of such Code*) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter . . . *in the same manner as such provisions apply to State gaming and wagering operations.*

25 U.S.C. § 2719(d)(1) (emphasis added). Thus, chapter 35 of the Internal Revenue Code applies to Indian gaming in the same manner as it does to state gaming. Section 4402(3), which is found in chapter 35 of the Internal Revenue Code, provides an express tax exemption for "any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of the State acting under authority of State law." I.R.C. § 4403(3). Accordingly, section 2719(d)(1) can reasonably be construed as providing a tax

exemption for wagers placed on lotteries and pull-tab games conduted by Indian tribes, because chapter 35 of the Internal Revenue Code provides such an exemption to state gaming opertations.

The government argues that Little Six is not exempt from wagering taxes, because section 2719(d)(1) only applies to those tax provisions that concern "the reporting and withholding of taxes [from] winnings." 25 U.S.C. § 2719(d)(1). However, in construing a statute we must give effect and meaning to all of its terms if possible. *See Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 133 L.Ed.2d 472 (1995). While section 2719(d)(1) does contain the language cited by the government, it is also explicitly refers to section 6050I and chapter 35 of the Internal Revenue Code, which clearly do not relate to "winnings." *See* I.R.C. § 6050I (returns relating to cash received in trade or business); I.R.C. §§ 4401-4405 (chapter 35) (taxes on wagering). Thus, the interpretation proposed by the government would render langauge in the statute superfluous, a result that we must attempt to avoid.

In view of the inconsistency between the statute's reference to winnings and its reference to section 6050I and chapter 35 of the Internal Revenue Code, we conclude that the language in section 2719(d)(1) is ambiguous. Little Six argues that, to the extent that the statute is ambiguous, the Indian conon of construction requires section 2719(d)(1) to be construed in their favor. We agree. As stated by the Supreme Court, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*,

471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985).[4]

Citing *Cook v. United States*, 86 F.3d 1085 (Fed. Cir. 1996), the government argues that the Indian canon of construction does not apply in this case, because tax exemptions must be clearly expressed by statute. In *Cook*, we held that members of the Onondaga Indian Nation were not exempt from federal taxes under 26 U.S.C. § 4041(a) for the sale of diesel fuel, because there was no language in the treaties at issue that could be constructed as conferning an express exemption upon Indians. *See Cook*, 86 F.3d at 1097. However, we then stated that "[w]e" recognize that if there are ambiguities in treaty language, they should be resolved in favor of the Indians." *Id.* (citation omitted). We further explained that none of the treaties at issue contained an ambiguity that could be construed as conferring an exemption. *See id.*

In the present case, having determined that the language of section 2719(d)(1) is ambiguous and can reasonably be construed as exempting Indian pull-tab games from the taxes at issue, we conclude that *Cook* is inapposite. Moreover, the Supreme Court has held that, "although tax exemptions generally are to be construed narrowly, in "the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict is liberal.'"

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[4] We note that the Tenth Circuit has recently held that 25 U.S.C. § 2719(d) does not provide tribes with the same exemption from Federal wagering excise taxes enjoyed by the states. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000). We do not agree. The Tenth Circuit did not discuss the Indian canon of construction, which we believe fully applies here.

Montana, 471 U.S. at 766, n.4, 105 S. Ct. 2399 (citing *Choate v. Trapp*, 244 U.S. 665, 675, 32 S. Ct. 565, 56 L.Ed. 941 (1912)). We therefore conclude that section 2719(d)(1) should be construed in favor of Little Six. The Court of Federal Claims erred in granting the government's motion for summary judgment and abused its discretion in denying Little Six's motion for summary judgment.

Our conclusion is further supported by the legislative history of the IGRA. The ultimate goal in construing a statute is to give effect to the intent of Congress. *See In re Portola Packaging, Inc.*, 110 F.3d 786, 788 (Fed. Cir. 1997). In fulfilling that duty, "we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Id.* (quoting *Cradon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 108 L.Ed.2d 132 (1990)). One of the primary purposes of the IGRA was to promote tribal economic development and self-sufficiency. *See* 25 U.S.C. § 2702 (1994). Equal treatment of tribes and states with respect to exemptions from federal wagering taxes is consistent with this legislative intent, and is in accord with the concept of co-equal sovereignty, *see* S. Rep. No. 446, at 13 (1988) ("The Committee concluded that the comparct process is a viable mechanism for setting various matters between two equal sovereigns").

CONCLUSION

For the above reasons, we conclude that Indian pull-tab games are exempt from federal wagering taxes under Chapter 35 of the Internal Revenue Code. Accordingly we.

REVERSE.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-468 T

LITTLE SIX, INC. AND SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, PLAINTIFFS-

v.

UNITED STATES, DEFENDANT

March 2, 1999

OPINION

SMITH, Chief Judge.

This case is before the court on cross-motions for summary judgment. Plaintiffs Shakopee Mdewakanton Sioux Community and its corporation, Little Six, Inc., seek a refund of federal excise taxes paid on gaming opertations conducted on their reservation between 1986 and 1992. Because Indian Tribal games are subject to excise taxation under Chapter 35 of the Internal Revenue Code, and because plaintiffs have not demonstrated any valid exemption to such taxes, the court must DENY plaintiff's Motion for Sumary Judgment and GRANT defendant's Cross Motion for Summary Judgment.

BACKGROUND

This is a suit for the refund of federal excise taxes imposed unpon gross wagers under IRC § 4401 and of the related occupational tax under IRC § 4411. Plaintiffs are suing for refund of taxes paid for the period January 1, 1986 to June 30, 1992, imposed because of "pull-tab" games operated on plaintiff's reservation in Minnesota. Plaintiffs are the Shakopee Mdewakanton Sioux (Dakota) Community (Community), which conducted the games directly until April 1, 1991, and Little Six, Inc., a corporation organized under the Community's tribal law and wholly-owned by the Community, which conducted the games from April 1, 1991 to June 30, 1992.

The IRS assessed taxes against plaintiffs, according to IRC Chapter 35, §§ 4401 and 4411, following an audit in 1991. In July 1992 plaintiffs paid under protest the taxes assessed for the period in question, totaling $174,289.39. Plaintiffs brought this suit in August 1992.

Indian tribes began conducting large-scale gaming operations on reservations in the early 1980s, and by 1991, 150 of the 312 federally recognized tribes were participating in some form of commercial gambling. *See* 15 HAMLINE L. REV. 471, 489. It has become a big business. For 1991, revenues from Indian gaming were estimated at $1 billion nationally. *Id.* Due to concerns about the infiltration of organized criminal elements, Congress passed the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710 *et seq.*, in 1988. IGRA, designed to protect both tribal independence and the welfare of citizens on and off the reservation, set guidelines for the conduct of tribal gaming. IGRA also discussed tax reporting and withholding reguirements.

DISCUSSION

Plaintiffs allege that the 0.25% federal excise tax imposed by 26 U.S.C. § 4401 (IRC Chapter 35) is not applicable to Indian gaming operations which are authorized by federal, but not by state, law. In the alternative, plaintiffs contend that if they are subject to the federal excise tax imposed by § 4401, then 25 U.S.C. § 2719(d)(1) (IGRA) creates a statutory inconsistency that must be construed in favor of Indian Tribes. According to this second argument, plaintiffs assert that § 2719(d)(1) requires that for purposes of IRC Chapter 35, tribes are to be treated as states, and are therefore exempted from federal excise tax by 26 U.S.C. § 4402.

Plaintiffs also dispute the levy of an occupational tax under § 4411, but this issue is determined solely by the outcome of the application of § 4401. Section 4411 imposes a $50 annual tax upon anyone who operates a game taxable at 0.25% under § 4401(a)(1), and imposes a $500 annual tax upon anyone subject to the 2% excise tax rate under § 4401(a)(2). The occupational tax under § 4411 does not depend upon the characterization of a game's operator(s). Instead, any taxpayer who is liable for the § 4401 tax also must pay the § 4411 occupational tax.

Plaintiffs argue first that their gaming operation is not addressed by and therefore is exempt from taxation under 26 U.S.C. § 4401(a)(1). Plaintiffs argue that their operation is authorized under federal law, not the law of Minnesota, so it can not be characterized as "state-authorized," and so is not taxable at the 0.25% rate. Plaintiffs claim that § 4401(a)(2), taxing "unauthorized" gaming operations at a 2% rate, is similary inapplicable,

reading "unauthorized" as "illegal." In essence, plaintiffs argue that a thrid, untaxed category must be implied by their interpretation of the terms used in § 4401: one for gaming authorized by federal but not by state law.

A careful reading of § 4401 show that plaintiff's reading of the statute is not reasonable. Section 4401(a)(2) imposes "on *any* wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager." (Emphasis added.) This language encompasses the entire universe of possible gaming operations. All wagers fall into one of the two categories; tribal gaming is either state-authorized, or it is unauthorized. Viewed in that light, imposition upon plaintiff of the 0.25% tax rate is the lightest possible application of § 4401(a)(1), and is actually a tax relief provision. Plaintiffs' attempt to characterize their gaming operation as outside the purview of state-authorized gaming proves too much, because the only option remaining is the higher tax level.

Plaintiffs argue in the alternative that if their gaming *is* addressed by § 4401, they may still claim exemption from the federal excise tax because IGRA § 2719(d)(1) puts them on an equal footing with the states. Section 2719(d)(1) states that

> "the provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and Chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming opertions conducted pursuant to this chapter . . . in the same manner as such provisions apply to State gaming and wagering operations."

Under 26 U.S.C. § 4402, wagers are not subject to federal excise taxes if placed with the state or its authorized agents. Plaintiff's argument would construct an "internal inconsistency" in § 2719(d)(1), then construe it to garner for tribes the same exemptions that § 4402 grants to states.

Defendant asserts that § 2719(d)(1) applies Title 26 to the reporting and withholding of taxes with respect to the winnings of players, not to the levy of excise taxes on the gaming operation itself. The language of the statute supports this interpretation. Section 2719(d)(1) effectively imposes the same responsibility on tribal gaming as on the states: to report and withhold from the winnings of players in their games. Chapter 35 § 4401, applying the federal excise tax on gross revenue to entities operating lotteries, deals with an entirely different issue.

Chapter 35, incorporated parenthetically into § 2719(d)(1), does not address the issue of reporting and withholding taxes on winnings. That discrepancy, plaintiffs allege, gives rise to the internal inconsistency. The Indian Canon of Construction, "that ambiguous statutes and treaties are to be construed in favor of Indians, applies to tax exemption." *Dillon v. United States*, 792 F.2d 849, 853 (9th Cir. 1986) (citing *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L.Ed. 941 (1912)). However, "[t]he intent to exclude [from tax] must be definitely expressed. . . ." *Id.* (quoting *Choteau v. Burnett*, 283 U.S. 691, 697, 51 S. Ct. 598, 75 L.Ed. 1353 (1931)). The issue must present genuine questions of interpretation before the tribe may be given the benefit of the doubt. Chapter 35 does not address reporting and withholding taxes on winnings,

but this possible oversight on the part of IGRA's drafters does not present tribes with a "blank check" to assume the mantle of states in all cases.

Plaintiffs characterize IGRA, citing its legislative history, as a statute that was intended to be beneficial to tribes. *See* 25 U.S.C. § 2702(1) (The purpose of this chapter is . . . "[to promote] tribal economic development, self-sufficiency, and strong tribal governments"). Plaintiffs also cite a letter written by Senator Daniel Inouye to IRS Commissioner Fred Goldberg, expressing his view of Congress's intention. Senator Inouye explains the reference to Chapter 35 in § 2719(d)(1) as a measure to ensure treatment of the tribes as states, for purposes of the federal excise tax on gross wagers. Senator Inouye's letter was dated December 12, 1991. One letter written three years after enactment of IGRA is insufficient to properly characterize the intent of the whole legislative process.

Plaintiffs cite several subsequent proposals in Congress which would have explicitly exempted tribal gaming from excise taxes, as support for their characterization of the legislative intent as pro-Indian. *See, e.g.*, H.R. 1920, 99th Congress. The original language of S. 555, the bill that became IGRA, included an explicit exemption for Indian gaming from federal excise tax, but that exemption was deleted prior to passage. Plaintiffs contention that the removal of the exemption must correspond to its implication elesewhere in the IRC is without basis. It makes little sense to offer, as proof of Congress's intent, language that Congress deliberately declined to enact. IGRA's purpose is better found in the language of the statute itself. Section 2702 makes clear that it was intended to regulate

tribes' gaming, not provide extra revenue to the tribes. Throughout IGRA, it is clear that, to the drafters, IGRA promoted tribal autonomy and welfare by trying to limit the influence of organized crime over tribal affairs.

If Congress intended to exempt Indians from federal excise taxs on gross wagers, other courses of action would be vastly more sensible than creating an intentional ambiguity that must be stretched to accommodate the tribes. I.R.C. § 7871(a) specifically addresses the roles in which the tribes are to be treated as states for excise tax exemptions. Reference to Chapter 35 and tribal gaming are conspicuously absent from the list of exempt activities. This is consistent with Congress's reasoning, as expressed in § 7871(b), that such exemptions are to be granted only when "the transaction involves the exercise of an essential governmental function of Indian tribal government." Tribal gaming is not such a function.

CONCLUSION

I.R.C. § 4401, on its face, classifies all wagers into either "state-authorized" or "unauthorized" gaming. The IRS taxes tribal gaming under the more lenient of the two possible rates, and the court can not infer a thrid category when the language of the statute is inclusive of all gaming operations. The IRS policy seems to expand the term "state-authorized" in § 4401(a)(1) to include gaming sanctioned by federal law, perhaps out of deference to the principle of tribal autonomy, instead of imposing the higher 2% rate on the tribes.

Plaintiffs' second argument, that § 2719(d)(1) allows tribes to take advantage of § 4402's state exemption to federal excise taxes, also must be dismissed. Section 2719(d)(1) imposes a burden on the tribes to report and withhold tax from the winnings of players "in the tribes' pull-tab lotteries. A parenthetical reference to Chapter 35 does not create an exemption from federal excise taxes with anywhere near the degree of specificity the law requires.

The court is constrained, of course, in its judgment by the language of the relevant statutes. Only if that language is unclear may the legislative history be relied upon. Here, however, both point to the same conclusion. It is clear that tribes are subject to basic taxation, that § 4401 and § 4411 are broad enough to embrace tribal gaming, and that plaintiff cannot show any specific exemption. Therefore, the court must DENY plaintiff's Motion for Summary Judgment and GRANT defendant's Cross Motion for Summary Judgment. Accordingly, the Clerk of the Court is directed to enter judgment for the defendant, dismissing plaintiff's complaint with prejudice.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5083

LITTLE SIX, INC. AND SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES, DEFENDANT-APPELLEE

Oct. 12, 2000

ORDER

Circuit Judge DYK, with whom Circuit Judges NEWMAN and PLAGER join, dissents in a separate opinion.

A petition for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the Court and filed by the Appellants, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges authorized to request a poll whether to rehear the appeal en banc, and a poll having been requested, taken, and failed,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the Court will issue on October 19, 2000.

DYK, Circuit Judge, with whom Circuit Judges NEWMAN and PLAGER join, dissenting from the Order denying the petition for rehearing en banc.

This case raises important questions concerning the use and effect of the "Indian canon" of construction in interpreting a significant federal statute. The panel decision conflicts with a recent decision of the United States Court of Appeals for the Tenth Circuit. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000).

The statute at issue here states: "The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . in the same manner as such provisions apply to State gaming and wagering operations." 25 U.S.C. § 2719(d)(1) (West Supp. 2000). The panel held that the parenthetical reference to chapter 35—the chapter of the Internal Revenue Code that imposes a tax on wagers—exempts Indian pull-tab games from taxation. *See Little Six, Inc. v. United States*, 210 F.3d 1361, 1366 (Fed. Cir. 2000). However, this construction cannot be

reconciled with the other language of the statute, which applies only to provisions "concerning the reporting and withholding of taxes with respect to the winnings." Chapter 35 is not such a provision.

As I read the panel opinion, it finds a facial ambiguity in the statute because of the conflict and resorts immediately to the Indian canon to resolve that ambiguity in favor of the tribe. However, in my view, the panel should not have invoked the Indian canon of construction so quickly. Instead, it should have utilized all available tools of statutory construction before declaring the statute ambiguous and resorting to a default rule designed for exceptional cases where, despite the court's best efforts, an ambiguity in the statute remains.

I agree that making sense of 25 U.S.C. § 2719(d) here is not an easy task. Despite the government's efforts, there is no way to reconcile § 2719(d)'s literal limitation to provisions of the Internal Revenue Code "concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations" with its parenthetical reference to chapter 35. I do not find persuasive the government's argument (adopted by the United States Court of Appeals for the Tenth Circuit) that the reference to chapter 35 was designed to incorporate § 4421's definitions of wagers and lotteries. *See Chickasaw Nation*, 208 F.3d at 883; 26 U.S.C. § 4421. For example, chapter 35 itself explicitly states that its definitions of wagers and lotteries apply only "for purposes of [chapter 35]," 26 U.S.C. § 4421, and its definitions are thus irrelevant for purposes of the other sections of the Code referenced by § 2719(d). I thus agree with the panel that confining § 2719(d)(1) to

provisions "concerning the reporting and withholding of taxes" does in fact render the statute's reference to chapter 35 superfluous. *See Little Six, Inc.*, 210 F.3d at 1365.

In my view, we are confronted with a situation in which it is impossible to give effect to all the language of the statute without rendering the statute self-contradictory. However, this does not create an ambiguity in the statute that justifies immediate resort to a canon designed to resolve ambiguities. Rather, a court under such circumstances should examine the statute's structure, purpose, and history in order to produce an interpretation that makes the statute coherent. The choice here is to accept the statute's limitation to provisions "concerning the reporting and withholding of taxes with respect to . . . winnings," thereby rendering *superfluous* the parenthetical reference to chapter 35, or to accept that the reference to chapter 35 exempts Indian gaming from taxation, thereby *contradicting* the statute's limitation to provisions "concerning the reporting and withholding of taxes with respect to . . . winnings."

While the general rule is that meaning should be afforded to all language in a statute, statutory language inadvertently included can be disregarded if it is found to be contrary to legislative intent. *See United States v. Colon-Ortiz*, 866 F.2d 6, 10 (1st Cir. 1989); *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, pp. 192-93 (6th ed. 2000) (stating that "words and clauses which are present in a statute only through inadvertence can be disregarded if they are repugnant to what is found, on the basis of

other indicia, to be the legislative intent"). Furthermore, the rule against superfluity has limited force when the alternative is to create even greater problems. In *Church of Scientology v. IRS*, 792 F.2d 153, 163 (D.C. Cir. 1986) (en banc), *aff'd* 484 U.S. 9, 108 S. Ct. 271, 98 L. Ed.2d 228 (1987), Judge (now Justice) Scalia noted that the court's interpretation of the Haskel Amendment, which caused two statutory provisions to become superfluous, was "nothing beside the textual and policy absurdities produced" by a contrary interpretation. That situation seems similar to the case here.

First, I cannot see how an erroneous parenthetical reference to a supposed example can trump the clear limiting language adjacent to the parenthetical. Moreover, as the government points out, it is unlikely that Congress would create a significant tax exemption through a parenthetical reference, and it seems exceedingly unlikely that Congress would do so in a sentence which by its terms is restricted to reporting and withholding of taxes on winnings.

Second, a court should adopt a construction of the statute that makes it coherent. The panel's interpretation of the statute here may resolve this particular case, but it leaves the interpretation of the limitation ("provisions . . . concerning the reporting and withholding of taxes with respect to . . . winnings") unresolved. Is the effect of the panel decision somehow to modify the limitation to make it consistent with the specific examples? If so, what does the limitation now mean? Or does the panel's opinion eliminate the limitation because it is inconsistent with the specific examples? If so, not only would the panel be rendering

the limitation superfluous, but also it would have the effect of making all provisions of the Internal Revenue Code "apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." There is no claim that Congress intended this result. It is far easier to make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation.

Third, the legislative history does not support the result rendered by the panel. Early versions of the bill that ultimately became the Indian Gaming Regulatory Act ("IGRA") (of which § 2719(d) is a part) would have exempted tribes from the wagering tax. H.R. 1920, passed by the House in 1986, provided: "Provisions of the Internal Revenue Code of 1954, as amended, concerning the *taxation* and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations." H.R. 1920, 99th Cong. § 4 (1986) (emphasis added). The accompanying House report explicitly linked chapter 35 with the bill's reference to taxation. It noted that "Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) and chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities." H.R. Rep. No. 99-488, at 13 (1986).

The Senate bill as originally proposed continued to include the reference to "taxation." S. 555, 100th Cong.

§ 20(D) (Feb. 19, 1987). However, in the version of the bill reported out of Committee and ultimately enacted, the reference to "taxation" was removed. The fact that the committee at the same time added a parenthetical including examples of both "reporting and withholding" provisions and "taxation" provisions hardly evidences a decision to have the specific taxation examples substitute for the general "taxation" exclusion. If the specific examples were a substitute for the general exclusions, how can the retention of the "reporting and withholding" language be explained? The legislative history here provides no clear guidance. The language of the provision has all the earmarks of a simple mistake in legislative drafting. The better explanation for the reference to chapter 35 is therefore that it was included inadvertently after Congress had decided to eliminate the reference to "taxation."

Fourth, I disagree with the panel's analysis of the purpose of § 2719(d). The panel seeks further support from the stated purposes of the IGRA, noting that the IGRA was intended "to promote tribal economic development and self-sufficiency." *Little Six, Inc.*, 210 F.3d at 1366; 25 U.S.C. § 2702. This policy strikes me as too open-ended to support the result here. The fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes.

I find that the statute's structure, purpose, and history all support the conclusion that the statute's reference to chapter 35 is superfluous. Thus, I think the panel here places more weight on the canon of construction regarding resolving ambiguities in favor of the Native Americans than that canon can bear. The

Supreme Court has stated that the canon is not a license to adopt a "contorted construction" of a statute. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106 S. Ct. 2039, 90 L. Ed.2d 490 (1986) (citing various cases noting that the canon is not license to disregard congressional intent). Nor can the canon properly be invoked to avoid the traditional analysis required for statutory construction. For example, in *Hagen* v. *Utah*, 510 U.S. 399, 114 S. Ct. 958, 127 L.Ed. 2d 252 (1994), the Supreme Court analyzed whether Congress had diminished a reservation. Although the Court recognized that it must "resolve any ambiguities in favor of the Indians," *id.* at 411, 114 S. Ct. 958, it did not shrink from applying the usual tools of statutory construction: the Court considered the language of the relevant Acts, their legislative history, contemporary historical evidence, and the Court's past precedents. *See id.* at 412-21, 114 S. Ct. 958. Despite the existence of the Indian canon, the Court concluded that the evidence demonstrated that the reservation had in fact been diminished by Congress, a result which led the dissent to complain that the Court was purporting to apply the Indian canon but "ignores [it] in practice." *Hagen*, 510 U.S. at 424, 114 S. Ct. 958 (Blackmun, J., dissenting). The panel's approach here appears to be inconsistent with the Supreme Court's approach in *Hagen*.

To be sure, fairness to our Native American population has been a quality in very short supply during much of our history. But we have not been assigned the task of redressing past wrongs by expanding the scope of federal statutes.

For the above stated reasons, I respectfully dissent from this Court's refusal to grant the United States' petition for rehearing en banc.

APPENDIX D

STATUTORY PROVISIONS

1. Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), provides:

Application of title 26

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041 and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2719(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

2. Internal Revenue Code (26 U.S.C.) provides:

Section 4401. Imposition of tax

(a) Wagers

(1) State authorized wagers

There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.

(2) Unauthorized wagers

There shall be imposed on any wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager.

(b) Amount of Wager

In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subschapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Section 4402. Exemptions

No tax shall be imposed by this subchapter—

(1) Parimutuels

On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) Coin-operated devices

On any wager placed in a coin-operated device (as defined in section 4462 as in effect for years beginning before July 1, 1980), or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2) (as so in effect), or

(3) State-conducted lotteries, etc.

On any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

* * * * *

Section 7871. Indian tribal governments treated as States for certain purposes

(a) General rule

An Indian tribal government shall be treated as a State—

(1) for purposes of determining whether and in what amount any contribution or transfer to or for the use of such government (or a political subdivision thereof) is deductible under—

(A) section 170 (relating to income tax deduction for charitable, etc., contributions and gifts),

(B) sections 2055 and 2106(a)(2) (relating to estate tax deduction for transfers of public, charitable, and religious uses), or

(C) section 2522 (relating to gift tax deduction for charitable and similar gifts);

(2) subject to subsection (b), for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by—

(A) chapter 31 (relating to tax on special fuels),

(B) chapter 32 (relating to manufactures excise taxes),

(C) subchapter B of chapter 33 (relating to communications excise tax), or

(D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles);

(3) for purposes of section 164 (relating to deduction for taxes);

(4) subject to subsection (c), for purposes of section 103 (relating to State and local bonds);

(5) for purposes of section 511(a)(2)(B) (relating to the taxation of colleges and universities which are agencies or instrumentalities of governments or their political subdivisions);

(6) for purposes of—

(A) section 105(e) (relating to accident and health plans),

(B) section 403(b)(1)(A)(ii) (relating to the taxation of contributions of certain employers for employee annuities), and

(C) section 454(b)(2) (relating to discount obligations); and

(7) for purposes of—

(A) chapter 41 (relating to tax on excess expenditures to influence legislation), and

(B) subchapter A of chapter 42 (relating to private foundations).

(b) Additional requirements for excise tax exemptions

Paragraph (2) of subsection (a) shall apply with respect to any transaction only if, in addition to any other

requirement of this title applicable to similar transactions involving a State or political subdivision thereof, the transaction involves the exercise of an essential governmental function of the Indian tribal government.

* * * * *